

**ORIGINAL**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Supreme Court, U.S.  
FILED

APR 15 1985

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NO. 84-5447

RAYMOND EUGENE TEAGUE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE  
SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

I. Whether Tennessee's capital sentencing scheme, which requires a death sentence if the jury finds that mitigating circumstances do not outweigh statutory aggravating circumstances, unconstitutionally "mandates" a sentence of death.

II. Whether a special instruction to the jury on consideration of an issue supported only by circumstantial evidence was required where both direct and circumstantial evidence had been introduced.

III. Whether the introduction of various pieces of relevant evidence, much of which was not objected to by defense counsel, violated the petitioner's rights to due process and confrontation.

IV. Whether due process was violated by the exclusion of irrelevant evidence of the victim's character.

V. Whether use of a prior conviction as an aggravating circumstance violated due process, where the conviction was based on a valid plea of nolo contendere.

VI. Whether the federal constitution requires individual sequestered examination of prospective jurors in every capital case, regardless of the absence of a showing that the selected jury was in fact impartial.

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### OPINIONS BELOW

The first opinion of the Supreme Court of Tennessee, affirming the petitioner's conviction but reversing the sentence of death and remanding for a new sentencing hearing, is reported at 645 S.W.2d 392, and will be referred to herein as "Teague I." The second opinion of the Supreme Court of Tennessee, affirming the petitioner's sentence of death on remand, is reported at 680 S.W.2d 785, and will be referred to herein as "Teague II."

### JURISDICTION

The petitioner seeks review of the judgments of the Supreme Court of Tennessee affirming his conviction of murder in the first degree and his sentence of death. Tenn. Code Ann. §39-2-202. The last judgment (on appeal after remand) was entered on October 29, 1984, and the petitioner's petition for rehearing was denied on December 10, 1984. Justice O'Connor granted an extension of time to the petitioner, allowing him up to and including March 8, 1985 in which to file his petition for the writ of certiorari. The petition was docketed on March 8, 1985, and was received by counsel for the respondent on March 12, 1985.

The Supreme Court of Tennessee has indefinitely stayed petitioner's execution pending the disposition of this proceeding before this Court.

The petitioner seeks review pursuant to 28 U.S.C. §1257.

# STATEMENT OF THE CASE

The petitioner and Terri Teague were married in 1973 and had two children. They were divorced in January of 1979, and the petitioner obtained legal custody of their children. In July of 1979, a man named John Mark Edmonds was killed. Police investigation showed that Terri Teague had actually shot Edmonds, but that she had done so out of fear for her own life, a fear which had been intentionally induced by the petitioner for the purpose of causing Edmonds' death. Terri Teague actively cooperated in the investigation of the Edmonds murder case and tape recorded five or six of her subsequent conversations with the petitioner. During one of these conversations, the petitioner told Terri that if she died, she would die in a bathtub.

The petitioner was subsequently indicted for the Edmonds murder, and found out about the tape-recorded conversations and obtained transcripts of them. He remarked to a co-worker, Jimmy Cook, that if Terri were "out of the way" the Edmonds murder case would never go to court.

Terri Teague lived alone in a duplex apartment in Chattanooga, Tennessee. She was quite security-conscious, and in addition to a complex system of locks on the front door, she had pushed a heavy piece of furniture against the back door. Terri Teague had told her friends that she was afraid of the petitioner. To the knowledge of her friends, Terri always showered and never took a bath. (The petitioner testified that she took baths when they were married, but he did not know her habits after the divorce or after he told her that she would die in a bathtub.)

Terri Teague was last seen alive at her apartment between 8:00 and 8:30 p.m. on the evening of April 3, 1980. The friend who left her apartment at that time called her 20



minutes later; she was lying in her bed watching television, and may have been eating some chili she had prepared that day.

The petitioner, meanwhile, was spending that evening with Jimmy Cook and Marshall Skinner, generally driving around in Skinner's truck and drinking beer. Cook and Skinner noticed that the petitioner was "nervous" and "tense." The petitioner asked Skinner to drive by Terri Teague's house, and the petitioner told Cook that he was going to kill Terri (Cook did not believe him). They drove up and down the street past Terri's house twice, but each time the petitioner would point out that the lights were still on and would tell Skinner to keep driving.

The third time they went by the duplex the lights were out. The petitioner asked to be dropped off, and told the other men to pick him up in a few minutes. They came back once, but the petitioner told them to return in 45 minutes. When they returned, the petitioner was standing on the front steps of the duplex, carrying a brown plastic garbage bag which he brought back to the truck.

As the petitioner got into the truck, he told Cook that he had killed Terri. Just as they were preparing to drive away, a police cruiser responding to a report that a truck had been driving up and down the street in a suspicious manner, came over the hill towards Skinner's truck. Cook heard the petitioner say, "Let's leave; there comes the police." Skinner remembered that the petitioner saw the police car and exclaimed, "Oh shit. I kilt that bitch."

The police officer, unaware of the murder, pulled up in front of the truck and walked over to ask Skinner for his driver's license. As he was talking with Skinner, he heard a metallic noise in the cab and saw the petitioner

bending over. Certain that he was about to be shot, the officer drew his revolver, ran around the back of the truck, and ordered the men out. He then found a loaded and cocked .45 caliber automatic pistol between the passenger door and the seat, and the petitioner admitted that the pistol was his.

After another officer had arrived and the situation had cooled down, the men told the officers that they were just driving around and drinking beer. One of the officers noticed that the petitioner had a pair of pliers in his back pocket, and that his left shirt sleeve was buttoned wrong so that his arm was in the hole above the cuff button area. Cook and Skinner appeared to be surprised when they realized that the pistol had been in the truck, but acted rationally when answering the officers' questions. The petitioner, however, was extremely nervous and breathless. When one of the officers casually mentioned that his report would result in the men being suspects should a burglary or murder be discovered in the neighborhood, the petitioner fainted and collapsed on the ground. After he recovered, he was arrested for carrying a pistol with intent to go armed.

The next morning Terri failed to show up for a regular coffee rendezvous with a friend, who attempted to telephone her and who went to her apartment but received no response to knocks on the door. The police were called, and entered the apartment with the owner's passkey (none of the security devices was in place). The detectives found Terri's nude body floating face down in the bathtub, which was full of water. An autopsy revealed that she had died between midnight and 6:00 a.m., and that the cause of death was drowning both in the backwater and from aspiration of vomitus. Within an hour before her death, Terri had suffered a blow to her left temple which would at least have



addled her, and which could have rendered her unconscious. Her stomach contents indicated that she had eaten within two hours before her death.

The friend who had visited the evening before noticed three significant differences in the condition of the apartment. A letter from the district attorney regarding the Edmonds murder trial was missing, a glass pane from the back door was broken, and the bed had been made up with different sheets. One of the sheets which had been on the bed was found in the washing machine.

The detectives soon learned about the incident involving the petitioner in front of the duplex in the early morning hours. Jimmy Cook was taken into custody and made a statement that night, and the petitioner was arrested soon afterward. Earlier in the day, the petitioner had told Cook that Terri's body had been found, and instructed Cook not to tell the police anything if questioned. Also that day, Skinner was cleaning out the truck (which he had borrowed) and found the plastic garbage bag. He became scared, and threw the bag into a creek. Two days later he turned himself in and made a statement to police, and also showed them where he had thrown the garbage bag.

The bag contained several items connected to Terri's apartment. A yellow sheet matching the one found in the washer was in the bag. A clump of hair on the sheet was microscopically identical to Terri's hair, and a stain on the sheet smelled like chili. A blue blouse and a black skirt of Terri's were in the bag; the blouse had been torn into pieces. The letter from the district attorney was in the bag, as well as a pair of gloves. Several shreds of glass from the bag matched the breakage pattern of the broken pane in the back door, and carpet fibers from the bag matched the samples taken from the apartment.

The petitioner was indicted on April 25, 1980, charged with first-degree murder, Tenn. Code Ann. §39-2-202, and carrying a pistol with the intent to go armed, Tenn. Code Ann. §39-6-1701. Trial before a jury commenced on November 18, 1980. The State presented proof of the facts detailed above. The petitioner testified, denying any complicity in Terri's death, and claiming that his arrest in front of her apartment was a coincidence, since he had no idea that she lived there and did not see her car parked in front. By his testimony and by other proof, he attempted to establish that Skinner and Cook had committed the murder. On November 22, 1980 the jury found the petitioner guilty of first-degree murder and carrying a pistol, sentencing him in the pistol case to serve a term of 11 months and 29 days in the county penal farm, and to pay a fine of \$1,000.

A separate hearing was held on the issue of the sentencing in the murder case. The State relied upon its proof at the guilt phase to support its request for the death penalty, and in addition introduced an arrest warrant alleging that in May of 1978 the petitioner had conspired with two other men to commit murder. That charge had been dismissed. The defendant presented general character evidence, including an explanation of the earlier murder charge (the petitioner's mother testified that another of her sons had informed the police about the conspiracy to murder case to get even with the petitioner for being loved more by their mother). In sentencing the petitioner to death, the jury relied on two statutory aggravating circumstances: (1) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. §39-2-203(1)(5), and (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest for prosecution of the defendant or another, Tenn. Code Ann. §39-2-203(1)(6). In accordance with the

statute, the jury also found that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances. Tenn. Code Ann. §39-2-203(g).

The petitioner took an automatic direct appeal to the Tennessee Supreme Court, which affirmed the convictions (and the sentence in the weapons case), but reversed the death sentence on January 31, 1983. The court found that the evidence that the petitioner had been arrested in a murder case which was subsequently dismissed was error, since the evidence was not relevant to any of the statutory aggravating circumstances. The case was remanded for a new sentencing hearing. Teague I, 645 S.W.2d 392, 399 (Tenn. 1983).

The first attempt to resentence the petitioner ended in mistrial on July 6, 1983, and venue of the sentencing hearing had to be changed. The final sentencing hearing began on August 22, 1983, and continued through August 25, 1983. The trial court had denied the petitioner's motion for an individual, sequestered selection of the jury.

At the resentencing hearing, the State presented an abbreviated version of its original proof about the circumstances of the murder and the defendant's arrest in front of the duplex on the night of the murder. In addition, the State showed that the petitioner had been indicted for the murder of John Mark Edmonds in 1979, and had entered a plea of nolo contendere on June 15, 1982, resulting in a conviction of accessory before the fact to murder in the second degree.

The petitioner presented character proof, although many of these character witnesses were not aware that the

petitioner had been driving around on the night of the murder with a loaded gun and with two men who were drinking beer. Many of these witnesses were also unaware that a conviction had been entered in the Edmonds murder case. The petitioner's mother also testified that he had been a good son and good father, and that he had not given her any trouble and had been a "normal boy" and a "very good son." On cross-examination, the prosecutor attempted to impeach this testimony by asking about an incident in July of 1978 in which that prosecutor and a police officer had been called to her house and had spoken with her and her family. She denied that she had told either of the men that the petitioner was giving her any trouble at the time. Finally, the prosecutor asked her specifically whether she had expressed to him that she felt that the petitioner was planning to kill somebody. Before she could answer this question, an objection was raised and a jury-out hearing was held on the matter.

At the jury-out hearing, the prosecutor explained his good-faith recollection of his conversations with the mother in July of 1978, and she then testified to her opposite recollection. The petitioner's motion for a mistrial was overruled, the jurors were instructed to disregard the prosecutor's last question, and no further questions were asked of the witness. The petitioner did not testify.

In sentencing the petitioner to death, the jury specifically found two aggravating circumstances: (1) that the defendant was previously convicted of one or more felonies involving the use or threat of violence to the person, Tenn. Code Ann. §39-2-203(i)(2), and (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant, Tenn. Code Ann. §39-2-203(i)(6). The jury further found

that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances found by them. Tenn. Code Ann. §39-2-203(g).

The defendant again took an automatic direct appeal to the Tennessee Supreme Court, which affirmed the resentence to death on October 29, 1984. Teague II, 680 S.W.2d 785 (Tenn. 1984). A petition for rehearing was denied on December 10, 1984. The petitioner's execution was stayed on December 21, 1984, pending disposition of the instant petition for the writ of certiorari.

#### REASONS FOR DENYING THE WRIT

##### I. TENNESSEE'S CAPITAL PUNISHMENT SCHEME DOES NOT IMPOSE A MANDATORY DEATH SENTENCE.

In Tennessee, a sentencing jury must first find beyond a reasonable doubt that one or more of 12 aggravating circumstances have been proved by the State. The jury is then to consider the existence of mitigating circumstances, included but not limited to mitigating circumstances listed by statute. Finally, if the aggravating circumstances are not outweighed by the mitigating circumstances found by the jury, "the sentence shall be death." Tenn. Code Ann. §39-2-203(g); State v. Melson, 638 S.W.2d 342, 366 (Tenn. 1982), cert. denied \_\_\_ U.S. \_\_\_, 103 S.Ct. 770 (1982).

This sentencing system does not unconstitutionally mandate the death penalty in every case, unlike the mandatory death sentencing scheme disapproved in Woodson v. North Carolina, 428 U.S. 280 (1976). Instead, Tennessee's system provides the sentencing jury with the guidance which was found lacking in Furman v. Georgia, 408 U.S. 238 (1972). Tennessee's sentencing scheme is no more "mandatory" than the procedures approved in Jurek v. Texas, 428 U.S. 262



(1976).<sup>1</sup>

Because Tennessee's sentencing scheme is clearly constitutional in this regard, a grant of certiorari in this case would be inappropriate.

II. THE TRIAL COURT'S INSTRUCTION TO THE JURY ON CONSIDERATION OF CIRCUMSTANTIAL EVIDENCE DID NOT VIOLATE DUE PROCESS.

The trial court instructed the jury on the difference between direct and circumstantial evidence. Although no request was made at the time, the petitioner contended in his motion for a new trial and on appeal that the trial court erred in failing, sua sponte, to give a special instruction on how to consider a prosecution based solely on circumstantial evidence. He based this contention on a doctrine of state law under which, in cases where all incriminating evidence is circumstantial, the trial court must instruct the jury that they may convict (or sentence) only if the proof excludes every other reasonable theory or hypothesis except the defendant's guilt. State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975).

There are several problems with the petitioner's argument which make it inappropriate for certiorari review by this Court. First, the special instruction is obviously not necessary where the evidence is both direct and circumstantial in nature. State v. Caldwell, 671 S.W.2d 459, 465-66 (Tenn. 1984), cert. denied \_\_\_ U.S. \_\_\_, 105 S.Ct.

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<sup>1</sup>Under the Texas procedure approved in Jurek, the death sentence is imposed if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of three special questions is yes. 428 U.S. at 269. In fact, Tennessee's system is somewhat "cleaner" in that it explicitly sets forth the consideration of mitigating circumstances, a consideration which is only implicit in the Texas procedure approved in Jurek.



231 (1984). At the resentencing hearing in the instant case, on the issue of whether the murder was committed for the purpose of interfering with or preventing a lawful prosecution against the petitioner,<sup>2</sup> the jury was presented with both direct and circumstantial evidence. Perhaps the most important piece of evidence against the petitioner on this point was his statement to Jimmy Cook that the petitioner's case would never go to court if Terri were "out of the way." There was also direct evidence that the petitioner intentionally killed the victim, including his statements to his companions that he had killed her. It seems beyond question that these pieces of evidence were direct and not circumstantial, and that an instruction on consideration of a wholly-circumstantial case would have been inappropriate.

The second problem with the petitioner's argument is that he failed to request the instruction at trial. While this omission did not prevent the Tennessee Supreme Court from ruling on the merits of the issue, Teague II, 680 S.W.2d at 790, it would be inappropriate for this Court to review the issue without proper preservation in the trial court.

In any event, the petitioner has failed to persuasively suggest that a federal constitutional issue is raised by his contention. There is no question that the jury at the resentencing hearing was fully instructed on the State's burden of proving the aggravating circumstances beyond a reasonable doubt, and we are aware of no case in which this Court or any other court has held that the cir-

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<sup>2</sup>The defendant raises this issue only with respect to this aggravating circumstance, apparently conceding that there was direct evidence in support of the other aggravating circumstance.

cumstantial evidence instruction requested by the petitioner is constitutionally required.

**III. THE RELEVANCY AND APPROPRIATENESS OF EVIDENCE PRESENTED AT THE RESENTENCING HEARING IS A MATTER OF STATE LAW, AND THE PETITIONER'S RIGHT TO DUE PROCESS WAS NOT VIOLATED.**

In this issue, the petitioner has identified several pieces of evidence which he claims should not have been admitted at the resentencing hearing.<sup>3</sup> As a general matter, the State submits that the review of these evidentiary issues would be inappropriate, as these are matters generally entrusted to state courts. However, because the petitioner has attempted to turn these issues into constitutional ones, each piece of evidence will be treated separately below:

1. The first piece of evidence is the testimony of two witnesses that the victim had told them that she was afraid of the petitioner. The petitioner's problem here is that he failed to object to the introduction of this evidence at trial, and the Tennessee Supreme Court refused to rule on the merits because the petitioner had not questioned the admissibility of the statements. Teague, 11, 680 S.W.2d at 788. In any event, both statements fell squarely within the well-recognized "state of mind" exception to the rule against hearsay.

2. The petitioner also complains of a witness's testimony that the victim had told him she was afraid to take a bath. Defense counsel objected to this testimony, and the objection was sustained by the trial court. There

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<sup>3</sup>Most of this evidence was also admitted at the guilt phase of the original trial, but the petitioner did not take issue with the introduction of the evidence in his first appeal to the Tennessee Supreme Court.

was no further motion to strike or motion for a mistrial. As the Tennessee Supreme Court held, the testimony "could not therefore be a factor in the jury's decision." Teague II, 680 S.W.2d at 788. Under these circumstances, it would be highly inappropriate for this Court to review this non-issue.

3. The petitioner also attacks the admissibility of a detective's testimony that Terri Teague was going to be a witness against the petitioner in the Edmonds murder case. Again, defense counsel chose not to object to the admissibility of this testimony, and the Tennessee Supreme Court refused to review the merits of this issue. Teague II, 680 S.W.2d at 788. In any event, the testimony could hardly be considered hearsay, since it was based not on the victim's out-of-court statements, but rather on the detective's personal knowledge of the Edmonds case, as well as objective proof such as the listing of the victim as a witness on the indictment in the Edmonds case and the district attorney's letter to the victim seen on her kitchen table. In the absence of a statement by an out-of-court declarant, it is difficult to perceive a confrontation problem in this issue.

4. As detailed in the Statement of the Case above, the petitioner's mother testified that the petitioner had been a very good son and had never given her any trouble. However, the prosecutor remembered in good faith a 1978 incident in which the witness had told him that she was afraid the petitioner was going to kill someone. He therefore asked her about that incident, but the trial court cut off testimony before the question could be answered. After a jury-out hearing, the trial judge determined that the matter would be inadmissible, and no further questions were asked of the witness before the jury. The jury was also carefully instructed to disregard the last question.

Therefore this issue does not deal with the admissibility of evidence, since the trial court ruled that the witness' answer to the question would be inadmissible. The only issue on appeal, therefore, is whether the trial court abused its discretion in overruling the motion for a mistrial. The Tennessee Supreme Court found "nothing to indicate that the overruling of the mistrial motion was an abuse of the trial judge's discretion, nor is there any indication that the asking of the question by the state affirmatively affected the jury's decision." Teague II, 680 S.W.2d at 788. The weighing of a trial court's discretionary decision not to declare a mistrial on the basis of an evidentiary error certainly does not present an issue appropriate for certiorari review by this Court.

In any event, a review of the record does not indicate that the overruling of the motion for a mistrial denied due process. It was well established in the jury-out hearing that the prosecutor was acting in good faith when he asked the question, and this finding is particularly credible since the prosecutor himself was a party to the conversation about which the witness was being cross-examined. Furthermore, the jurors were instructed to disregard the question, and the instruction was more than a routine admonition.<sup>4</sup> It is also important to note that the jury heard only the question, and knew nothing of the subsequent warrant or the specific charges which were leveled against the petitioner as a result of the conversation with his mother. The jury did not even hear the witness admit or deny the question asked by the prosecutor.

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<sup>4</sup>The trial court instructed the jury: "Jurors, I instruct you to disregard Mr. Sloan's last question and, as much as humanly possible, to forget you ever heard the question."

5. Finally, the petitioner claims a violation of due process in the State's introduction at the resentencing hearing of evidence concerning the circumstances of the murder itself. He claims simply that the evidence was irrelevant and prejudicial. The Tennessee Supreme Court disagreed, holding that the evidence had been carefully limited to the essential background of the case, "ensur[ing] that the jury act[ed] from a base of knowledge in sentencing the defendant." Teague II, 680 S.W.2d at 788. Furthermore, a review of the specific pieces of evidence cited by the petitioner reveals that it was all relevant.

For example, evidence of the condition of the victim's apartment, her bathing habits, and the condition of her body all tended to establish that the murder was premeditated and intentional, highly relevant considerations in determining the existence of the statutory aggravating circumstance involving the petitioner's commission of the murder for the purpose of interfering with or preventing a lawful prosecution. Similarly, testimony about the circumstances of the petitioner's arrest in front of the apartment tended to show that he had committed the murder in an intentional and premeditated manner, suggesting that he had done so for a particular reason. Finally, the fact that he had been carrying a loaded pistol was not only relevant to the circumstances of the murder, but also tended to rebut character witnesses who testified in mitigation. These witnesses had testified that the defendant was a good father and honest man and a good worker; superior officers had testified that he was a good soldier. It was therefore highly relevant to point out to these witnesses, most of whom did not know, that the petitioner had been toting a cocked and loaded pistol on the night of the murder. Some of the witnesses then conceded that this fact was inconsistent with safe weapon handling and good parenting.



IV. THE EXCLUSION OF IRRELEVANT EVIDENCE OF THE VICTIM'S CHARACTER DID NOT VIOLATE DUE PROCESS.

Defense counsel attempted several times at the resentencing hearing to launch a broad attack upon the character of the deceased victim, Terri Teague. Specifically, counsel wanted to show that Terri Teague had no concern for her children, used drugs, was promiscuous, and may have even committed embezzlement. The petitioner contended in the Tennessee Supreme Court that this proof was offered in rebuttal to the State's evidence that the petitioner killed the victim to prevent her from being a witness against him in another case, "by evidence of a different motive for her slaying."

None of the attempted proof about Terri Teague's character would have been relevant to the motive issue. The mere fact that the victim was promiscuous or a poor mother simply fails to make it more probable that the petitioner had a different motive for killing her, particularly since they were separated and divorced, and the petitioner had custody of his children. Similarly, the fact that Terri Teague may have coolly and voluntarily killed John Mark Edmonds did not erase the petitioner's motive for getting her "out of the way."

Finally, the petitioner has overlooked the fact that much of the evidence he tried to introduce was not excluded on the ground of irrelevance, but was excluded as inadmissible hearsay.

V. THE USE OF THE PETITIONER'S PRIOR CONVICTION ON A PLEA OF NOLO CONTENDERE IS A MATTER OF STATE LAW, AND THERE WAS NO EVIDENCE IN THE RECORD THAT THE NOLO CONTENDERE PLEA WAS ENTERED INVOLUNTARILY.

As can be seen from reading the petitioner's argument on this issue, he has presented what amounts to an



issue of state law interpretation. Specifically, he questions whether a judgment of conviction entered upon a plea of nolo contendere constitutes a "previous conviction" under the aggravating circumstance set forth in Tennessee Code Annotated §39-2-203(i)(2).<sup>5</sup> The petitioner also contends that the use of the conviction violated Tennessee Rule of Criminal Procedure 11(e)(6). Relying on authority from other jurisdictions, the Tennessee Supreme Court held as a matter of state law that a conviction on a plea of nolo contendere may be used to enhance punishment. Teague II, 680 S.W.2d at 788-789.

The petitioner has failed to persuasively argue that there should be a federal constitutional distinction between convictions which are based on pleas of nolo contendere and those based on pleas of guilty. It is generally well settled that a conviction on a nolo contendere plea "subjects the defendant to all the consequences of a conviction in the same way as if it were after a plea of guilty or not guilty." Annot., 89 A.L.R.2d 540, §42 (1963). A majority of courts which have considered the issue have held that a nolo contendere conviction counts as a "conviction" in punishment proceedings such as those instituted under recidivist statutes. See People v. Goodwin, 593 P.2d 326 (Colo. 1979) and cases cited therein. Furthermore, this Court has recognized that even guilty pleas are not always admissions of guilt, but instead are entered for strategic reasons. North Carolina v. Alford, 400 U.S. 25 (1970). Under the petitioner's argument, such guilty plea convictions would also be excluded from consideration. Such a result would be absurd.

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<sup>5</sup>The aggravating circumstance reads as follows:  
"The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person."

In connection with this issue, the petitioner has raised questions regarding the voluntariness of his nolo contendere plea. It is important to note that this issue was argued for the first time in the appeal to the Tennessee Supreme Court, and was never presented to the trial court (except by the silent introduction into evidence of a transcript of the plea hearing). Thus we have no factual finding by the trial court regarding voluntariness. Nevertheless, the Tennessee Supreme Court reviewed the transcript, and even though it found that Tennessee Rule of Criminal Procedure 11 may not have been strictly complied with, "the plea was voluntary and [the petitioner] understood that he was losing his right to a jury trial and cross-examination." Teague II, 680 S.W.2d at 789.

In any event none of the alleged "defects" in the taking of a nolo contendere plea has federal constitutional implications. The record clearly establishes that the plea was voluntary, and accompanied a knowing and intelligent waiver of the petitioner's basic rights as required by Boykin v. Alabama, 395 U.S. 238 (1969). Furthermore, the factual basis for the petitioner's claim of involuntariness must be further developed, either in the state courts or on federal habeas corpus review, before this Court should grant certiorari. See Marshall v. Lonberger, 459 U.S. 422 (1983).

VI. IN THE ABSENCE OF A SHOWING THAT THE PETITIONER WAS DENIED AN IMPARTIAL JURY, INDIVIDUAL SEQUESTED EXAMINATION OF PROSPECTIVE JURORS IS NOT CONSTITUTIONALLY REQUIRED.

The petitioner is unable to point to any part of the record in the instant case which even suggests that the jury at the resentencing hearing was anything less than impartial. Nevertheless, he argues that because this case involved the death penalty, the Sixth Amendment's require-


ment of an impartial jury should be expanded to require individual sequestered examination of prospective jurors in all capital cases. The State submits that such a ruling is unsupported by precedent, and would be inappropriate under the facts of this case.

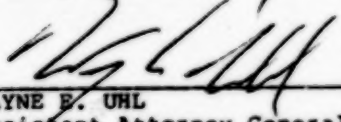
The Tennessee Supreme Court has specifically rejected the suggestion that individual examination should be adopted in all death penalty cases, State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984), cert. denied \_\_\_ U.S. \_\_\_, 105 S.Ct. 226 (1984), expressly disagreeing with the holding of Hovey v. Superior Court of Alameda County, 28 Cal.3d 1, 158 Cal. Reptr. 128, 616 P.2d 1301 (1980). It is important to note the Tennessee Supreme Court indicated in Workman that the establishment of a specific showing of prejudice from group juror qualification will justify the use of individual sequestered examination. 667 S.W.2d at 49. This protection is all that is required to ensure an impartial jury under the Sixth Amendment.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

  
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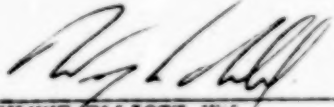
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail to Mr. William P. Redick, Jr., Fifth Floor, 207 Third Avenue North, Nashville, Tennessee 37201, on this 11th day of April, 1985.


  
W. J. MICHAEL CODY  
Attorney General of Tennessee  
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NOTARIZED STATEMENT OF MAILING

I, Wayne Elliott Uhl, a Member of the Bar of this Court, do hereby swear and affirm that I caused the foregoing Respondent's Brief in Opposition to be mailed to the Clerk of this Court by first-class U.S. mail on the 11th day of April, 1985. The document was meter-stamped at my office, and was placed in a box for regular pickup by the U.S. Postal Service on that date.

  
\_\_\_\_\_  
WAYNE ELLIOTT UHL  
Assistant Attorney General

Sworn to and subscribed before me  
on this the 11th day of April, 1985.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: 7.8.87